

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 155 Firearm Records

**SPONSOR(S):** Rep. Harrington

**TIED BILLS:** **IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Thomas	Havlicak
2)			
3)			
4)			
5)			

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**SUMMARY ANALYSIS**

Florida maintains very few records related to firearms. It does keep limited records relating to pawnbrokers, concealed weapon licenses, and criminal history checks.

The bill prohibits any state, regional, or local governmental entity from keeping, or causing to be kept, any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of such firearms. The bill applies the same prohibition against private persons and entities. The bill provides certain exemptions to the prohibition.

A violation of the prohibition is a third degree felony. Any employee of a state or local governmental entity who violates the prohibition and knew, or reasonably should have known, that they were doing so, is subject to immediate dismissal from their employment.

The bill provides that a governmental entity, or their designee, shall be fined at least \$250,000, and not more than \$5 million, if a list, record, or registry is compiled in violation of the prohibition and a court finds that the information was compiled with the knowledge of the management of the entity. The state attorney is charged with investigating complaints of violations of the prohibition in their respective jurisdictions.

The bill does not appear to have a fiscal impact on state or local government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |                             |   |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

Florida maintains very few records related to firearms. Section 790.001(6), F.S., defines the term "firearm" to mean:

any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

Pursuant to s. 790.065, F.S., the Florida Department of Law Enforcement (FDLE) performs criminal history record checks through the National Crime Information Center (NCIC) of the Federal Bureau of Investigations (FBI) when a licensed importer, licensed manufacturer, licensed dealer, or licensed collector attempts to sell a firearm to another person. FDLE must destroy the record of the criminal history check within 48 hours after the day it delivers a response to the licensee's request. These requests are done by telephone and usually take only a few minutes.

Private persons and entities are generally free to maintain their business and personal records relating to firearms and firearm purchases. Federal firearm dealer regulations require firearm dealers to keep certain information relating to transactions<sup>1</sup>. As part of the National Firearms Act, certain types of firearms such as machine guns and short-barreled shotguns must be registered with the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF).<sup>2</sup> The Florida Department of Agriculture and Consumer Affairs issues licenses to carry concealed weapons and firearms pursuant to s. 790.06, F.S.

In Attorney General Opinion AGO 2001-51, issued on July 18, 2001, the Attorney General opined that local law enforcement authorities could submit confidential records of pawnbroker transactions, on a voluntary basis, to FDLE for inclusion in a statewide pawnbroker database which only is accessible by approved law enforcement officers. These confidential records are submitted by the pawnbroker, most often electronically, to local law enforcement agencies pursuant to s. 539.001, F.S., regulating pawnbroker transactions. While the Attorney General's opinion concluded that records submitted to the statewide database would maintain their confidential status, this statewide database has never been created. A demonstration project is being conducted wherein, rather than creating a statewide database, Florida law enforcement agencies have access through a switching network to access each other's databases. These pawnbroker transaction records include transactions involving firearms used to secure a loan from pawnbrokers.

<sup>1</sup> 18 U.S.C. 923; 27 C.F.R. 478.125; 27 C.F.R. 478.126; 27 C.F.R. 478.134.

<sup>2</sup> 26 U.S.C. 5861; 27 C.F.R. 479.101. The registration identifies the firearm, the date of registration and the identification and address of the person entitled to possess the firearm.

The bill provides legislative findings that:

- a list, record, or registry of individuals who privately own firearms is a violation of their right to keep and bear arms and their right to privacy;
- a list, record, or registry of legally owned firearms or firearm owners is not a law enforcement tool and could be used to harass citizens who choose to own a firearm and could possibly be used by thieves;
- a list, record, or registry of legally owned firearms or firearm owners is not a tool for fighting terrorism and could be used as a means to profile and harass citizens who choose to bear firearms;
- any governmental official who compiles such a list, record, or registry is violating the firearm owner's privacy and the public trust; and
- firearm owners whose names are on such a list, record, or registry deserve redress.

The bill provides that the Legislature intends to:

- protect the rights of individuals to bear arms;
- protect the privacy rights of firearm owners; and
- create an absolute prohibition of any form of registration of firearms or firearm owners.

The bill prohibits any state, regional, or local governmental entity from keeping, or causing to be kept, any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of such firearms. The bill applies the same prohibition against private entities.

The bill prohibits records of pawnbroker transactions relating to firearms from being electronically transferred to local law enforcement agencies. Other transactions may still be electronically transmitted and the firearm transaction records may be submitted by means other than electronically.

A violation of the prohibition is a third degree felony punishable by up to five years in prison and by up to a \$5,000 fine<sup>3</sup>. Any employee of a state or local governmental entity who violates the prohibition and knew, or reasonably should have known, that they were doing so, is subject to immediate dismissal from their employment. The bill prohibits the use of public funds (except those funds used to provide an indigent person an attorney pursuant to their constitutional right to counsel) in the defense of any person charged with violating this section, unless the charges are dismissed or the person is found not guilty.

The bill provides that a governmental entity, or their designee, shall be fined at least \$250,000, and not more than \$5 million, if a list, record, or registry is compiled in violation of the prohibition and a court finds that the information was compiled with the knowledge of the management of the entity. This appears to be a civil fine since governmental entities cannot be charged with state crimes. The state attorney is charged with investigating complaints of violations of the prohibition in their jurisdiction. Violations must be vigorously prosecuted. It appears that the state attorney would bring a civil cause of action against a governmental entity.

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<sup>3</sup> The bill does not provide a severity ranking for the new felony criminal penalty. Pursuant to s. 921.0013, F.S., unranked third degree felonies have a level 1 ranking.

The bill provides certain exemptions to the prohibition. The exemptions are:

- firearms used in a crime, any person convicted of a crime of violence, or records of a stolen firearm (however, these records must be destroyed within 30 days after the stolen firearm is recovered);
- federally required records by firearm dealers (however, these records may not be converted into any form of list, registry, or database);
- records related to the criminal history background check provisions of s. 790.065, F.S.;
- firearm records required to be kept by pawnbrokers pursuant to ch. 539, F.S., may be kept until the expiration of the loan secured by the firearm (however, these records may not be transmitted electronically to any person or entity);
- FDLE records pertaining to criminal history record checks through the NCIC of the FBI to the extent required by federal law;
- records by insurers against theft or loss of firearms provided such list is not sold, commingled with records relating to other firearms, or transferred to another person or entity (however, the insurer must destroy these records within 60 days after the policy expires or the insured notifies the insurer that the insured no longer owns the firearm);
- a list of customers of a firearm dealer, provided the list does not disclose the particular firearms purchased (however, such list may not be sold, commingled with records relating to other firearms, or transferred to another person or entity);
- sales receipts by sellers of firearms or a person providing credit for the purchase of firearms (however, the receipts may not be used for the creation of a database for the registration of firearms);
- personal records maintained by the owner of firearms;
- records of a business which stores or acts as a selling agent for the lawful owner of firearms;
- membership lists of firearm owner organizations;
- records maintained by an employer or vendor of the firearms owned by its officers, employees, or agents if the firearms are used in the course of the employer's or vendor's business; and
- records maintained pursuant to s. 790.06, F.S., related to the issuance of licenses to carry concealed weapons or concealed firearms by the Department of Agriculture and Consumer Services (however, the Department may only keep such records on an individual who was a licensee within the prior two years).

C. SECTION DIRECTORY:

**Section 1:** Creates s. 790.335, F.S., prohibiting any person from keeping any list, record, or registry of privately owned firearms or owners of firearms; provides exceptions and penalties.

**Section 2:** Requires that any prohibited list of firearms or owners of firearms must be destroyed within 60 days after the bill becomes law.

**Section 3:** Provides a severability clause. In case any part of the bill is held invalid, the remainder of the bill will stand.

**Section 4:** Provides that the bill will take effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any significant impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any significant impact on state expenditures. While it does create a new felony penalty which is unranked on the offense severity chart in s. 921.0013, F.S., third degree felonies rarely result in jail or prison time. The Criminal Justice Estimating Conference routinely classifies new third degree felony penalties as having no fiscal impact or insignificant fiscal impact. The Conference will put this bill on its next agenda for consideration. No date has been set at this time for the next Conference meeting. See also additional fiscal comments in "D." below.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill appears to have an indeterminate impact on local governments' revenues. See also additional fiscal comments in "D." below.

#### 2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures. While it does create a new felony penalty, third degree felonies rarely result in jail or prison time. See also additional fiscal comments in "D." below.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any significant economic impact on the private sector. The bill may impact the recordkeeping of certain businesses, but the exceptions provided in the bill appear to provide enough flexibility for businesses to continue their economic activity in this area.

### D. FISCAL COMMENTS:

The bill provides for a possible fine to be assessed against governmental entity violators of up to \$5 million. In addition, any third degree felony conviction under the bill's provisions could result in fine of up to \$5,000. Pursuant to s. 142.01, F.S., as of July 1, 2004, fines collected under the penal laws of the state are distributed to the Clerk of Courts of the respective county where the prosecution occurred.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

##### 2. Other:

The bill contains various provisions relating to public records. The bill appears to merely restate existing public record exemptions, except with a few word and punctuation differences. If these exemptions were determined to be new exemptions, they would need to be in a separate public records bill as required by s. 24(c) of Article V., of Florida's State Constitution.

The application of the records prohibition on private persons and entities arguably may violate First Amendment free speech rights.

#### B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The public records exemption and accompanying provisions provided in the bill on line 127 through line 159, are almost identical to an existing exemption and provisions in s. 790.065(4), F.S., except with a few word and punctuation differences. If this exemption was determined to be a new exemption, it would need to be in a separate public records bill<sup>4</sup>. However, since it appears to be the repetition of an existing exemption, the bill should be amended to reference the existing exemption and make clear that it is a restatement of the existing exemption.

In the newly created section 790.335, there is a paragraph (3)(a) but not a paragraph (b). Also, the subparagraphs in paragraph (3)(a) are not all parallel in construction. A technical amendment will be prepared to address these concerns.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

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<sup>4</sup> FLA. CONST. art. V, s. 24(c).